No. 3833

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM R. CASTLE, LORRIN A. THURSTON and ALFRED L. CASTLE, trustees under the will of James Bicknell Castle,

Plaintiffs in Error,

vs.

HAROLD K. L. CASTLE and the TERRITORY OF HAWAII,

Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

A. G. M. ROBERTSON,
ALFRED L. CASTLE,
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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

And now come William R. Castle, Lorrin A. Thurston and Alfred L. Castle, trustees under the will of James Bicknell Castle, plaintiffs in error, and respectfully petition this court for a rehearing of the above entitled cause because of alleged errors in the opinion of the court.

I.

This court decided the appeal upon a ground not argued by either party nor suggested in any way by the opinion of the court below. There has been no claim in any of the proceedings that the trustees received an absolute gift for their own benefit, under the will of James Bicknell Castle. The court says,

> "There can be but one transmission of property by a testator and that is the one made by will, and, when, as in this case, it is made to trustees who take the *legal and equitable title* * * * the trustees become the other party to the succession and the taxable transfer becomes complete."

What the plaintiffs in error now ask is in reality not a rehearing but an original hearing upon this question, averring that they never claimed and do not now claim a personal right in three hundred thousand dollars' worth of property.

II.

This court seems to have based its decision that there was no clear error to call for the overruling of the territorial court upon a question of local law because of its conclusion that the gift to the trustees was a gift to them absolutely not as trustees but as individuals to take both the legal and equitable estate. It is respectfully suggested that the trustees took as trustees for two purposes; one

to pay an annuity to the son, and the other to establish an educational charity; that these are two separate and distinct gifts and their values are agreed upon by the stipulation. It is respectfully suggested that the only way they can be merged is by holding the charity void whereby there would be a resulting trust for the son's benefit. If there was a trust created it was necessary for this court to pass upon its validity, which, apparently, has not been done. It is urged that a discretion for accumulation does not make a charity void, which was decided in *Inglis v. Sailors' Snug Harbor,* 3 Peters, 99, and that in the case of *St. Paul's Church v. Attorney General,* 164 Mass. 188-204, in which the counsel were Richard Olney and John C. Gray, the court said and decided:

> "We are of opinion that the proper course is to hold that the limits of accumulation for the benefit of a charity are subject to the order of a court of equity."
>
> *Gray on Perpetuities,* Secs. 678, 679.

It is also decided in an opinion by Judge Devens, *Burbank v. Burbank,* 152 Mass. 254, that for any such purpose the attorney general may act and see that the trustee exercises a proper discretion.

III.

The court below failed to pass upon the question whether the amount of the tax was correct, as it says in its opinion that the only questions before

it were whether the annuity and the remainder were taxable. It is respectfully suggested that unless the apparent view of this court is adopted—that there was an absolute gift of property to the trustees as individuals (which question has not been argued)—that all trust estates in the territory will be subject to a tax at the maximum rate irrespective of who the beneficiaries are or who the trustees are, as in this case one of the named trustees is the son who if he took either individually or in trust under the law of the territory, ought not to be taxed at 6½% but at 3%.

IV.

It is respectfully suggested that all personal property given by will is held in trust by the executor of the will and if the contention is upheld that it is the trustee and not the beneficiary who is the successor to the property, then all personal property passing by will should be taxed upon the amount passing to the executor who is a trustee. It is strongly but respectfully urged that there is no case in the books where trustees are held to be successors under an inheritance tax law so as to determine the rate of taxation. The only purpose for which they are regarded as successors is to make them liable for the tax, which in this case has never been disputed.

Wherefore the plaintiffs in error petition for a rehearing of the appeal.

Dated, San Francisco,
June 28, 1922.

WILLIAM R. CASTLE,
LORRIN A. THURSTON,
ALFRED L. CASTLE,
Trustees under the Will of James Bicknell Castle,
A. G. M. ROBERTSON,
ALFRED L. CASTLE,
W. A. GREENWELL,
ARTHUR WITHINGTON,
A. L. CHICKERING,
Attorneys for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiffs in error and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
June 28, 1922.

A. L. CHICKERING,
Of Counsel for Plaintiffs in Error and Petitioners.